

EXHIBIT 3 BUH

DATE 2-4-09

HB 378



Driving Trucking's Success

MONTANA MOTOR CARRIERS ASSOCIATION

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February 4, 2009

Mr. Chairman members of the committee.

I am Spook Stang, Executive Vice President of the Montana Motor Carriers Association.

The MMCA and its members would like to go on record in support of HB 378 with the amendments mentioned by Representative Blasdel.

In 2007 we presented a similar bill that exempted brokers from Workers Compensation in response to an audit by State Fund employees. We did not attempt to exclude Freight Forwarders at that time as the bill was introduced late and we did not want to cloud the issue. I have attached a definition of both Freight Forwarder and Broker for your convenience.

With the amendments we think it is clear that we are attempting to exempt the service provided by a Freight Forwarder as we did that of a broker in 2007. We have also limited the exemption to those who have actually filed and received a freight forwarding license as defined under 49 USC 13102. We have done this as they may be a number of people out there who call themselves freight forwarders, but have not registered with the Federal Motor Carriers and received their authority.

I have also attached a letter from a law firm who deals with workers compensation and independent contractors through out the US which may better explain the reasons than I.

The only difference between a Freight Forwarder and a Broker is that the Freight Forwarder is responsible for the liability and insurance on the cargo and a broker is not.

This contract is similar to the contract between an insurance broker and his client which is not considered an employee or an Independent Contractor.

This bill in o way exempts Freight Forwarders from covering their employees who are answering the phones and securing these contracts.

Mr. Chairman and members of the committee I will be available to try to answer all questions

AMENDMENT TO HOUSE BILL NO. 378
INTRODUCED BILL
REQUESTED BY M. BLASDEL

1. Title, lines 4 and 5.

Following: "ENTITLED"

Strike: "AN ACT EXEPANDING THE EMPLOYMENTS TO WHICH THE WORKERS' COMPENSATION ACT DOES NOT APPLY TO INCLUDE FREIGHT FORWARDERS"

Insert: "AN ACT EXEMPTING FROM THE WORKERS' COMPENSATION ACT THE EMPLOYMENT OF PERSONS PERFORMING THE SERVICES OF AN INTRASTATE OR INTERSTATE COMMON OR CONTRACT MOTOR CARRIER IF HIRED BY A FREIGHT FORWARDER; AMENDING SECTION 39-71-401, MCA; AND PROVIDING AN EFFECTIVE DATE."

2. page 4, line 6.

Strike: line 6 in its entirety

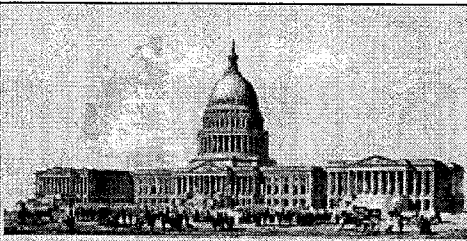
3. page 3, line 29.

Following: "broker"

Insert: "or freight forwarder"

4. page 5, following line 14.

Insert: "NEW SECTION. **Section 2. Effective date.** [This act] is effective on passage and approval."



TITLE 49 > SUBTITLE IV > PART B > CHAPTER 131 > § 13102

§ 13102. Definitions

In this part, the following definitions shall apply:

- (1) Board.**— The term "Board" means the Surface Transportation Board.
- (2) Broker.**— The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.
- (3) Carrier.**— The term "carrier" means a motor carrier, a water carrier, and a freight forwarder.
- (4) Contract carriage.**— The term "contract carriage" means—
 - (A)** for transportation provided before January 1, 1996, service provided pursuant to a permit issued under section 10923, as in effect on December 31, 1995; and
 - (B)** for transportation provided after December 31, 1995, service provided under an agreement entered into under section 14101 (b).
- (5) Control.**— The term "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by—
 - (A)** common directors, officers, stockholders, a voting trust, or a holding or investment company, or
 - (B)** any other means.
- (6) Foreign motor carrier.**— The term "foreign motor carrier" means a person (including a motor carrier of property but excluding a motor private carrier)—
 - (A)**
 - (i)** that is domiciled in a contiguous foreign country; or
 - (ii)** that is owned or controlled by persons of a contiguous foreign country; and
 - (B)** in the case of a person that is not a motor carrier of property, that provides interstate transportation of property by commercial motor vehicle (as defined in section 31132) under an agreement or contract entered into with a motor carrier of property (other than a motor private carrier or a motor carrier of property described in subparagraph (A)).

(7) Foreign motor private carrier.— The term "foreign motor private carrier" means a person (including a motor private carrier but excluding a motor carrier of property)—

(A)

(i) that is domiciled in a contiguous foreign country; or

(ii) that is owned or controlled by persons of a contiguous foreign country; and

(B) in the case of a person that is not a motor private carrier, that provides interstate transportation of property by commercial motor vehicle (as defined in section 31132) under an agreement or contract entered into with a person (other than a motor carrier of property or a motor private carrier described in subparagraph (A)).

(8) Freight forwarder.— The term "freight forwarder" means a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business—

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle.

The term does not include a person using transportation of an air carrier subject to part A of subtitle VII.

(9) Highway.— The term "highway" means a road, highway, street, and way in a State.

(10) Household goods.— The term "household goods", as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is—

(A) arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(B) arranged and paid for by another party.

(11) Household goods freight forwarder.— The term "household goods freight forwarder" means a freight forwarder of one or more of the following items: household goods, unaccompanied baggage, or used automobiles.

(12) Household goods motor carrier.—

(A) In general.— The term "household goods motor carrier" means a motor carrier that, in the ordinary course of its business of providing transportation of household goods, offers some or all of the following additional services:

(i) Binding and nonbinding estimates.

(ii) Inventorying.

(iii) Protective packing and unpacking of individual items at personal residences.

(iv) Loading and unloading at personal residences.

(B) Inclusion.— The term includes any person that is considered to be a household goods motor carrier under regulations, determinations, and decisions of the Federal Motor Carrier Safety Administration that are in effect on the date of enactment of the Household Goods Mover Oversight Enforcement and Reform Act of 2005.

(C) Limited service exclusion.— The term does not include a motor carrier when the motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier).

(13) Individual shipper.— The term "individual shipper" means any person who—

(A) is the shipper, consignor, or consignee of a household goods shipment;

(B) is identified as the shipper, consignor, or consignee on the face of the bill of lading;

(C) owns the goods being transported; and

(D) pays his or her own tariff transportation charges.

(14) Motor carrier.— The term "motor carrier" means a person providing commercial motor vehicle (as defined in section 31132) transportation for compensation.

(15) Motor private carrier.— The term "motor private carrier" means a person, other than a motor carrier, transporting property by commercial motor vehicle (as defined in section 31132) when—

(A) the transportation is as provided in section 13501 of this title;

(B) the person is the owner, lessee, or bailee of the property being transported; and

(C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise.

(16) Motor vehicle.— The term "motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.

(17) Noncontiguous domestic trade.— The term "noncontiguous domestic trade" means transportation subject to jurisdiction under chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States.

(18) Person.— The term "person", in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person.

(19) Pre-arranged ground transportation service.— The term "pre-arranged ground transportation service" means transportation for a passenger (or a group of passengers) that is arranged in advance (or is operated on a regular route or between specified points) and is provided in a motor vehicle with a seating capacity not exceeding 15 passengers (including the driver).

(20) Secretary.— The term "Secretary" means the Secretary of Transportation.

(21) State.— The term "State" means the 50 States of the United States and the District of Columbia.

(22) Taxicab service.— The term "taxicab service" means passenger transportation in a motor vehicle having a capacity of not more than 8

passengers (including the driver), not operated on a regular route or between specified places, and that—

(A) is licensed as a taxicab by a State or a local jurisdiction; or

(B) is offered by a person that—

(i) provides local transportation for a fare determined (except with respect to transportation to or from airports) primarily on the basis of the distance traveled; and

(ii) does not primarily provide transportation to or from airports.

(23) Transportation.— The term "transportation" includes—

(A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

(24) United states.— The term "United States" means the States of the United States and the District of Columbia.

(25) Vessel.— The term "vessel" means a watercraft or other artificial contrivance that is used, is capable of being used, or is intended to be used, as a means of transportation by water.

(26) Water carrier.— The term "water carrier" means a person providing water transportation for compensation.

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1/31/2009
~~February 4, 2009~~

Mr. Barry "Spook" Stang
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Helena, MT 59601

RE: Property Broker Workers' Compensation Premiums

Dear Barry:

You recently requested that I comment on a trend you have observed in the Montana brokerage industry where certain workers' compensation auditors are wrongly concluding that brokers need to possess proof of insurance coverage for the motor carriers to whom they broker loads. Typically, auditors reach this conclusion based on their mistaken assumption that the broker is the principal contractor and that the motor carriers are thus subcontractors. As many states will hold the principal contractor liable for workers' compensation insurance coverage for the subcontractor's employees if the subcontractor fails to meet its insurance obligations, the auditors (although very few actually have taken this position over the years and I know of no such positions that have withstood legal challenge) are charging additional premiums to the brokers' policies to compensate for the perceived increased risk of exposure. As discussed more fully below, this argument rests upon a fundamental misunderstanding of the trucking industry and the role played by brokers in that industry.

Property brokers are not principal contractors, nor are for-hire motor carriers to which they tender freight subcontractors. Instead, property brokers contract with independent motor carriers to provide the actual movement of freight required by the brokers' customers. As such, the entities these auditors label "subcontractors" are in fact principal contractors with respect to the contractor drivers with whom they contract to physically haul the cargo. In other words, property brokers are not in that chain of liability as they occupy a wholly

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different market niche and perform a wholly different and discrete function. Property brokers operate in tandem with motor carriers, either functioning as a seller of the motor carrier's service or as a representative of the shippers of goods, the buyers of transportation services.

An appropriate analogy can be found in the insurance industry. A property broker is akin to an insurance broker. As noted above, a property broker represents either motor carriers or the shippers of freight. In the same way, insurance brokers represent either providers of insurance or buyers of insurance. Further, a property broker is not the overall assembler of the service and it does not face ultimate liability on account of that service. Its liabilities are defined by contract and by law, which immunizes property brokers from liability associated with the movement of the freight (both with respect to damage or injury to persons or cargo). See, e.g., *Delta Research Corp. v. EMS, Inc.*, 2005 WL 2090890 (E.D. Mich. 2005) (brokers not liable for shipper for damage to cargo occurring during transit); *Toledo v. Van Waters & Rogers, Inc.*, 92 F. Supp. 2d 44 (D.R.I. 2000 (broker not liable to third party for negligence of motor carrier which caused traffic accident)).

Again, by analogy, the liability of insurance brokers is similarly limited. While insurance brokers may be liable for errors and omissions associated with selling insurance, they are *not* generally liable for the problems associated with the insurer's policy language, wrongful coverage denials, or claims handling errors. In fact, both property brokers and insurance brokers typically purchase E&O policies to cover their principal business liabilities, which are distinct from those facing that actual provider of the transportation service or the insurance product.

If these auditors were to apply their position that motor carriers are subcontractors of property brokers to the insurance industry, it would produce an absurd result. Under this view, an insurance broker would be liable for the workers' compensation premium when an insurer with which it transacted business failed to secure workers' compensation coverage for the insurer's employees. This approach would dramatically change the way the insurance industry conducts business, and the economics and administrative burdens affecting these distinct industry segments would be profoundly altered. For example, imagine the economic upheaval that would result if Marsh USA were held responsible for the workers' compensation premiums of the insurers with which it conducted business (not to mention the concomitant upheaval experienced by Marsh's workers' compensation insurer which, upon asserting such a position, would thus assume a coverage obligation for the employees of Marsh's vast list of insurers). Similarly, the position that a property broker is a principal contractor to a motor carrier and thus liable for the motor carrier's

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employees imposes an impossible burden on the property broker, which might tender freight to many hundreds of motor carriers in a single policy period.

In addition, the position advanced by these auditors is impractical. While it might seem simple to require the broker to obtain certificates from each motor carrier, the speed at which brokerage operations transpire would make such a requirement unduly burdensome with respect to both brokers and shippers. This is because shippers often place property brokers in urgent scenarios. For example, a shipper's primary motor carrier might fail to arrive for a pick-up. The property broker might then be called upon on short notice to find a motor carrier to pick up the freight and deliver it to a destination in a matter of hours. Burdening such transactions with an insurance certificate verification process would have the effect of grinding interstate commerce to a halt in many instances.

Moreover, the coverage issues evoked by the auditors' stated position would prove impractical for insurers. Each auditor would have to assemble a list of every motor carrier that hauled freight tendered through the property broker insured by the insurance company (in some cases thousands of motor carriers) and examine each motor carrier's workers' compensation declaration page of any insurance policy that covered the policy period of the insured broker's policy. It would then have to obtain a payroll list of every motor carrier, make proper state payroll assignments, and recalculate the broker's premium. Following the logic of this position to its practical result, insurance companies would be the insurer to literally thousands of transportation workers. Under these circumstances, it is almost certain that the insurance companies' denial of claims from such workers based on a lack of coverage would constitute de facto improper claims handling. It is difficult to believe that these auditors intend to trigger such sweeping coverage obligations under the policies issued to property brokers or to precipitate such an immense administrative burden for the insurers' auditors.

More to the point, the position that for-hire motor carriers are subcontractors of property brokers fails because the employees of the motor carrier would not be considered statutory employees of the property brokers under workers' compensation law. This is because there is no principal contractor/subcontractor relationship between the broker and the motor carrier. Further, the indicia of employment between the broker and the employees of the motor carrier are lacking since the type of detailed control that would need to be exercised by the broker over the employees of the motor carrier to prove common law employment would result in the broker usurping the motor carrier's regulated duty to carry out the actual transportation of the freight. See 49 U.S.C. § 13102(12) (brokers expressly prohibited from providing

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transportation of freight). In effect, assuming the property broker's exercise of such control over the motor carrier's employees necessarily implies that the property broker is violating federal motor carrier law. This assumption, which would have to be asserted by insurance companies on a case-by-case basis, is legally improper.

Since property brokers are not principal contractors with respect to the motor carriers that haul loads for the brokers' customers, they does not face the specter of statutory liability for workers' compensation coverage. In sum, workers' compensation insurers face no increase in their liability exposure owing to their insured's brokerage operations. Accordingly, there is no basis for charging the additional premium being levied by some novice auditors.

If you have any questions regarding this letter, please do not hesitate to contact me.

Very truly yours,

Gregory M. Feary

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